

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34290

STATE OF IDAHO,	)	2008 Unpublished Opinion No. 594
	)	
Plaintiff-Respondent,	)	Filed: August 8, 2008
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
EMMANUEL BAUTISTA-AGUAYO,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Appellant.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Fifth Judicial District, State of Idaho, Blaine County. Hon. Robert J. Elgee, District Judge.

Judgment of conviction and unified seven-year sentence with three years determinate for lewd and lascivious conduct with a minor under sixteen, affirmed.

Daniel S. Brown of Fuller Law Office, Twin Falls, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Rebekah A. Cudé, Deputy Attorney General, Boise, for respondent.

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LANSING, Judge

Emmanuel Bautista-Aguayo appeals from his conviction and sentence for lewd conduct with a minor child under sixteen, Idaho Code § 18-1508. He claims error at sentencing because his presentence investigation report (PSI) was issued before his psychosexual evaluation was prepared and because the district court conducted a joint sentencing hearing for Bautista-Aguayo and his co-defendant. We affirm.

Bautista-Aguayo and Jose Vivar-Olivera plied two girls, ages twelve and thirteen, with alcohol and had sex with them. Bautista-Aguayo was indicted on two counts of felonious administering of drugs, I.C. § 18-913, and two counts of rape, I.C. §§ 18-6101(1), -6101(4). Pursuant to a plea agreement, he pleaded guilty to an amended charge of lewd conduct with a minor child under sixteen, I.C. § 18-1508. Vivar-Olivera also pleaded guilty to lewd conduct.

After the PSI was prepared, Bautista-Aguayo moved for a psychosexual evaluation. The district court granted the motion. The court later conducted a joint sentencing hearing for the

two men. Both men were sentenced to unified terms of seven years, with three years determinate. Bautista-Aguayo appeals.

Bautista-Aguayo seeks re-sentencing. He first contends that error occurred at sentencing because his presentence investigation report (PSI) was prepared before his psychosexual evaluation. He reasons that if his psychosexual evaluation had been reviewed by the presentence investigator, the investigator's comments in the PSI may have been more favorable and the district court may have imposed a lesser sentence.

Bautista-Aguayo did not request that his PSI be updated following the preparation of his psychosexual evaluation; indeed he made no objection to the content of the PSI. Therefore, we will entertain Bautista-Aguayo's claim of error, raised for the first time on appeal, only if there has been a manifest disregard of the requirements of Idaho Criminal Rule 32. *State v. Adams*, 137 Idaho 275, 277, 47 P.3d 778, 780 (Ct. App. 2002); *State v. Toohill*, 103 Idaho 565, 566-67, 650 P.2d 707, 708-09 (Ct. App. 1982). The rule allows a presentence investigator to make a recommendation regarding a psychological evaluation, *see* I.C.R. 32(b)(10), (d), which the investigator *did* here by noting that one had not been prepared and commenting that such an evaluation would be useful for sentencing purposes. However, the rule does not require that a psychological or psychosexual evaluation be reviewed by the investigator before the preparation of a PSI, nor does the rule require a PSI to be updated following the preparation of an evaluation. Therefore, Bautista-Aguayo has shown no error.

Bautista-Aguayo next contends that it was error for the court to conduct a joint sentencing hearing. He reasons that Vivar-Olivera's counsel, by his statements, acted as a second prosecutor against Bautista-Aguayo and that he was not afforded an opportunity to respond to the comments of Vivar-Olivera's attorney. In the district court, however, Bautista-Aguayo did not object to a joint sentencing hearing, did not object to Vivar-Olivera's counsel's statements, and did not request an opportunity to respond to them. Therefore, he did not preserve this claim of error for appeal. *State v. Nez*, 130 Idaho 950, 956, 950 P.2d 1289, 1295 (Ct. App. 1997). This Court will not address issues raised for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). Moreover, Vivar-Olivera's counsel's statements to the effect that Bautista-Aguayo's version of the events and his participation in the sexual conduct changed over time, that Bautista-Aguayo was minimizing his conduct and

choosing to blame Vivar-Olivera for his current predicament, were also made by the prosecutor, and Bautista-Aguayo was afforded an opportunity to respond to them.

Finally, the record does not support Bautista-Aguayo's additional claim that Vivar-Olivera's immigration status somehow had a deleterious effect on Bautista-Aguayo's opportunity to be placed on probation. Instead, the district court stated that the two men were "equally culpable" and that "given this crime and the acts involved, I don't think probation is realistic. I don't and never did think probation is even to be considered in this type of case." Even if this claim of error had been preserved for our review, Bautista-Aguayo has shown no prejudice arising from the joint sentencing hearing.

The judgment of conviction and sentence are affirmed.<sup>1</sup>

Chief Judge GUTIERREZ and Judge PERRY **CONCUR.**

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<sup>1</sup> To the extent that Bautista-Aguayo is attempting to raise additional issues in his reply brief, they will not be addressed because all claims of error must be presented in an appellant's opening brief. *Hernandez v. State*, 127 Idaho 685, 687, 905 P.2d 86, 88 (1995); *State v. Raudebaugh*, 124 Idaho 758, 763, 864 P.2d 596, 601 (1993).